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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation of	)	RM-8355
Foreign-affiliated Entities	)	RM-8392

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COMMENTS OF ƒONOROLA CORPORATION

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I. INTRODUCTION

The Federal Communications Commission ("FCC") issued the above-captioned *Notice of Proposed Rule-Making* ("NPRM")[1] to solicit comment on proposals to modify the existing public interest standard for considering foreign carrier applications under Sections 214 and 310 of the Communications Act to enter the U.S. telecommunications market to provide international services. Specifically, the FCC is proposing to include in its public interest analysis a market access "test" to determine if effective market access is, or will soon be, available to U.S. carriers seeking to provide basic international telecommunications services in the primary markets served by the carrier desiring entry. In addition, the FCC would continue to consider other factors as part of its public interest analysis, such as national security, the openness of other

[1] FCC 95-53 (Feb. 17, 1995).

telecommunications markets, and the ability and incentives of the foreign carrier to discriminate against unaffiliated U.S. carriers. The Commission's avowed goal is to encourage access to foreign markets by U.S. carriers.

*f*ONOROLA Corporation ("*f*ONOROLA") is a domestic-based telecommunications provider offering common carrier communications both within the United States and between the United States and Canada. *f*ONOROLA is wholly owned by a Canadian company, *f*ONOROLA Incorporated, which offers resale telecommunications in Canada and between Canada and other countries. As described below, in Canada, *f*ONOROLA competes with far larger companies, including the Stentor group (in which MCI is an investor) and Unitel (in which AT&T is an investor).[2] In the United States of course, *f*ONOROLA has only a tiny piece of the $12 billion international telephone market.[3]

*f*ONOROLA received its initial Section 214 authorization -- for international simple resale service between the United States and Canada -- in November 1992,[4] becoming the first carrier certified under the Commission's "equivalency" analysis. In the course of that decision, the Commission found that the Canadian marketplace afforded equivalent opportunities for U.S. carriers. The agency re-affirmed that

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[2] *See infra* for a description of the Canadian market.

[3] *See* Industry Analysis Division, 1993 Section 43.61 International Telecommunications Traffic Data at 4 (Nov. 1994).

[4] *f*ONOROLA Corp., 7 F.C.C. Rcd 7312 (1992).

decision less than one year ago.[5] Last year, *f*ONOROLA also was reclassified as a "non-dominant" carrier, after the Commission concluded that "there appears to be no substantial risk of discrimination against unaffiliated U.S. carriers."[6]

Now, the FCC is proposing to apply the analysis used in the *fONOROLA* decision to other international telecommunications authorizations. At the same time, the agency recommends making its standard more restrictive, by considering as "foreign" not only companies "controlled" by foreign telecommunications entities -- as is now the policy -- but potentially classifying as foreign a U.S. company as little as five percent owned by a foreign telecommunications entity. In a related proposal, the Commission suggests applying a similar standard to applications for *radio licenses*, on top of the restrictions contained in Section 310 of the Act.

*f*ONOROLA concurs with the Commission's goals as expressed in the *NPRM*. Greater market access to foreign markets -- especially in Europe -- would assist *f*ONOROLA and all U.S. carriers. *f*ONOROLA respectfully suggests, however, that the agency's proposal sweeps too broadly: by applying overly restrictive policies to all applicants equally, the Commission could disfavor foreign entities from countries with the most open telecommunications regimes and punish entities with no incentive or ability to discriminate. As a result, the Commission's proposal as drafted could

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[5] *f*ONOROLA Corp., 9 F.C.C. Rcd 4066 (1994).

[6] *f*ONOROLA Corp., 9 F.C.C. Rcd 2497, 2498 (1994) (quoting *Regulation of International Common Carrier Services*, 7 F.C.C. Rcd 7331, 7343 n.41 (1992)).

actually limit competition in the international telecommunications marketplace, to the detriment of the American public.

II. SUMMARY

The Commission's *NPRM* is replete with laudable goals, including increasing competition, streamlining regulation, and encouraging foreign market opening to U.S. carriers. *f*ONOROLA is concerned, however, that the FCC's proposals in this proceeding may have the effect of frustrating, rather than encouraging, the benefits associated with entry by foreign-owned telecommunications carriers into the U.S. market.

From the perspective of a reseller operating in an integrated North American telecommunications market, the current process and rules governing entry into the U.S. market are more restrictive than those in Canada, especially regarding entry of foreign carriers. As can be seen below, the process imposed on *f*ONOROLA at the onset of its application was burdensome, lengthy and expensive. In contrast, the Canadian marketplace is both competitive and transparent, as evidenced by the process imposed on ACC Long Distance (a unit of ACC Global Corp.) when it first became a Canadian reseller. No prior approval was required: ACC merely sent a letter notifying the CRTC, and the facilities-based carrier from whom they intended to lease facilities, of its intention to commence operations.

*f*ONOROLA respectfully submits that the addition of a market access standard to the existing public interest analysis might have the opposite effect intended by the Commission: it might impose additional and burdensome regulatory oversight and unnecessarily restrict the ability of U.S. carriers to obtain necessary financing from whatever source, even overseas. Any such rules, therefore, should be narrowly tailored to consider only the similar type of foreign telecommunications services, but not so fine-tuned that the rule resembles the "mirror" reciprocity proposal that the FCC has repeatedly rejected.

Moreover, the proposed rules do not appear to make a distinction between the entry of smaller, non-dominant, foreign-affiliated carriers into the U.S. market and large, dominant firms in their application of the market access standard.[7] As a result, imposition of a market access standard to the existing public interest analysis could have the effect of keeping out smaller foreign-affiliated competitors. This is particularly true in the case of carriers from Canada, a market that is already fully competitive and which became so without application of market opening pressure from U.S. regulators.

Further, the Commission should ensure that any market entry test does not provide existing and established U.S. carriers with a regulatory tool to delay or avoid

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[7] Such was the case in the application of dominant carrier regulation to *f*ONOROLA at a time when *f*ONOROLA's total revenues were approximately $25 million and the company had neither the means nor the inclination to exert any form of market dominance or market discrimination harmful to non-affiliated U.S. carriers.

competition. Either of these results will tend to reduce competition, to the ultimate disadvantage of the American public.

III. ƒONOROLA'S EXPERIENCE IN ENTERING THE U.S. MARKET

In April 1991, ƒONOROLA filed an application with the FCC for permission to resell private line telecommunications services of U.S. international telecommunications carriers providing switched service to and from Canada. ƒONOROLA's application was opposed by the existing carriers, including AT&T.[8] Although the Commission had no formal policy at that time against what came to be known as international simple resale ("ISR"), U.S. carriers were then complaining about the potential effect of private line offerings on switched services between the United States and Canada. Moreover, at the time of ƒONOROLA's application, the Commission did not prohibit foreign investment in carriers, it merely obliged these companies to adhere to "dominant carrier" regulation.[9]

In December of 1991 and December of 1992, the FCC dramatically liberalized its policies. First, in its First Report and Order on *Regulation of International Accounting Rates*, the Commission permitted U.S. carriers to offer ISR upon a showing

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[8] AT&T initially supported ƒONOROLA's application, then inexplicably reversed course and submitted a (late-filed) petition to deny.

[9] "Foreign-owned" was defined to include any company who is more than 15% owned or controlled by "alien", i.e., non-American interests. International Competitive Carrier, 102 F.C.C.2d 812, 842 n.74 (1985).

that the particular foreign country to be served by that carrier afforded resale opportunities equivalent to those available under U.S. law.[10] At the same time, the Commission changed its regulatory treatment of international carriers so that investment by a foreign telecommunications entity in a U.S. carrier rendered that carrier "dominant" only if the foreign entity "controlled" the U.S. carrier. Next, only a year later, the Commission adopted a new rule permitting international carriers considered dominant due to foreign investment to be reclassified as non-dominant so long as they had neither the incentive nor ability to discriminate among U.S. carriers.

In accordance with these new policies, *f*ONOROLA renewed its efforts to obtain U.S authorization. It first filed a new application in February 1992 with the FCC with the intent of proving to the FCC that the Canadian telecommunications market provided equivalent opportunities to U.S. resale telecommunications carriers. In April 1992, *f*ONOROLA filed an amended application with the FCC to answer additional questions from the FCC and provided additional material. AT&T opposed the application, and requested imposition of a host of burdensome conditions.

When the Commission granted the *f*ONOROLA authorization, in late 1992,[11] it became the first entity authorized to provide ISR. The Commission fully analyzed the Canadian telecommunications marketplace, finding that Canada provided U.S.

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[10] 7 F.C.C. Rcd 559 (1991).

[11] *f*ONOROLA Corp., 7 F.C.C. Rcd 7312 (1992).

carriers equivalent opportunities. *f*ONOROLA's application had at the time been pending for more than 18 months.[12]

On the same day that *f*ONOROLA received its approval, the FCC also changed its regulations regarding the entry of foreign-owned telecommunications companies into the U.S. market. The agency determined to liberalize dominant carrier rules by eliminating automatic treatment as dominant of every U.S. carrier in which there was foreign investment.[13] The FCC instead effectively restricted maximum regulation to those entrants who were found by the FCC to exercise monopoly power in their home market; non-dominant status would take effect automatically unless public opposition was filed. That decision became official in early March of 1993.

*f*ONOROLA became the first carrier with significant foreign investment to apply for non-dominant status under the new scheme. Immediately thereafter, *f*ONOROLA became the first carrier whose request to be reclassified was opposed, again by AT&T.[14] Fourteen months later, in May of 1994, the FCC denied AT&T's application and granted *f*ONOROLA's application for non-dominant status. Finally,

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[12] AT&T requested reconsideration of this decision; a year later the Commission denied the request. *f*ONOROLA Corp., 9 F.C.C. Rcd 4066 (1994). At the same time, the Commission imposed additional reporting requirements on providers of international simple resale services.

[13] Regulation of International Common Carrier Services, 7 F.C.C. Rcd 7331 (1992).

[14] Under existing rules, AT&T's opposition blocked automatic grant of the requested reclassification.

more than three years after it first applied, *f*ONOROLA was authorized to serve the U.S.-Canada market regulated similarly to other U.S. carriers of its size.

IV. THE CANADIAN MARKETPLACE

Canada itself has about one tenth the population of the United States, and its telecommunications marketplace similarly constitutes only about 10 percent of the market in the United States. Before the early 1980's, this market was relatively concentrated and permitted only limited competitive entry. Over the last decade, however, Canada has significantly liberalized competitive policies, permitting open and competitive entry. In so doing, Canadian deregulation followed that of the United States, albeit significantly telescoped in timeframe. But, as can be seen by comparing *f*ONOROLA's experience with the description below, today, in many ways, the Canadian market is more streamlined than is the U.S.

The process began in 1985, when the Canadian Radio-television and Telecommunications Commission ("CRTC") approved in general terms the resale and sharing of the long distance services of a number of interexchange carriers, including Bell Canada, Unitel and BC TEL. In 1987, the CRTC provided guidelines concerning the implementation of the terms for resale and sharing. The most notable of the limitations was a requirement that each interexchange circuit had to be dedicated to the private use of a single customer. In Telecom Decision CRTC 90-3, the CRTC permitted resellers in Ontario, Quebec and British Columbia to aggregate the traffic of any number of customers on the same leased interexchange circuits in order to provide discounted long distance voice services.

The most significant step in the evolution toward competition within the Canadian telecommunications industry came with Telecom Decision CRTC 92-12.[15] Decision 92-12, which effectively removed the monopoly rights of those Stentor companies with respect to the provision of interexchange long distance voice services in the territories in which they operate, opened up the provision of such services to substantial competition in all provinces of Canada other than Alberta, Saskatchewan and Manitoba by resellers, interexchange carriers and service providers utilizing a combination of leased and owned facilities.

Decision 92-12 also affected the activities of resellers in a number of significant ways. The CRTC required the Stentor companies operating in British Columbia, Ontario, Quebec and the Atlantic provinces to allow resellers, including *f*ONOROLA, to resell all switched long distance services, including bulk discounted long distance services such as WATS™ and 800 Service™.[16] The CRTC also directed the telephone companies subject to Decision 92-12 to provide all facilities-based carriers -- including

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[15] CRTC 92-12 (June 12, 1992). Decision 92-12 resulted from an application by Unitel and a joint application by B.C. Rail Telecommunications and Lightel Inc. ("BCRL") to the CRTC for permission to connect their telecommunications networks with the networks of six of the Stentor companies for the purpose of providing public long distance voice services.

[16] These provinces contain approximately 90 percent of Canadian population and most of the telecommunications traffic.

Unitel -- with "equal ease of access," that is, to allow such carriers to connect to toll and end office switches without requiring customers to dial extra digits. In Decision 92-12, the CRTC also indicated that it was predisposed to approve the applications of other interexchange carriers for equal ease of access on terms and conditions similar to those applicable to Unitel.[17]

As important as it was, Canadian liberalization did not stop with Decision 92-12. In July 1993, the CRTC issued Decision 93-8 allowing resellers to offer equal ease of access to their customers when it became available. Decision 93-17, released in October of 1993, and further action later that year extended the deregulation and liberalization of 92-12 to the provinces of Alberta and Manitoba. As a result, all Canadian provinces, with the exception of Saskatchewan, are under the regulatory jurisdiction of the CRTC and, subsequently, the same rules and terms and conditions governing competition. Equal Access became a reality in Canada in the provinces of BC, Alberta, Ontario, Quebec, and the four Atlantic Provinces as of 1 July 1994.

The Commission has also acted to check un-regulated use of monopoly power. In CRTC 94-13,[18] the CRTC explicitly recognized the potential for telephone companies to price on a predatory basis and, as a control on this anti-competitive

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[17] Decision 92-12 did not require the respondent telephone companies to provide equal ease of access to customers of resellers.

[18] Telecom Decision CRTC 94-13, Review of Regulatory Framework - Targeted Pricing, Anti-Competitive Pricing and Imputation Test for Telephone Company Toll Filings (July 13, 1994).

behavior, decided to require all telephone companies, when filing rate changes for existing competitive long distance services and introducing new competitive long distance services, subject such filings to an imputation test, *i.e.*, a price floor. This implies that all tariff filings of the type described above must include not only the causal costs of providing the service but the contribution that must be paid on each minute of telecommunications traffic generated with that service.

Canadian authorities have also moved to reduce cross subsidies. In Telecom Decision CRTC 94-19,[19] the Commission generally exceeded expectations by ordering the Stentor member companies to embark on an ambitious program of rate rebalancing by increasing local rates $2.00 a month each year for 1995, 1996 and 1997; by changing the method of regulating the telephone companies from rate-of-return to price cap regulation; by allowing competition in the local telecommunications network by both telecommunications carriers and cable television companies; by allowing co-location of competitor facilities and equipment inside Stentor central offices; by putting in place competitive safeguards to govern the market behavior of the Stentor telephone companies; and by changing the way in which contribution is collected from a system based on a fee per trunk to a system based on a fee per minute of telecommunications traffic carried on a carrier's network, including the Stentor members networks. As a result, both competitors and consumers have greater protection from any unequal market share.

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[19] Review of Regulatory Framework (Sept. 16, 1994).

Following this deregulation, the Canadian regulatory process has become open and transparent. For example, becoming a resale carrier in Canada is far simpler than in the United States: an entity seeking to become a resale carrier need only file a letter with the CRTC and the carrier from whom they intend to lease facilities of its intention. No prior CRTC approval is required, regardless of whether the entity seeking to become a reseller is Canadian or from another country. Indeed, a number of U.S.-based resellers successfully operate in the Canadian market, such as ACC Long Distance Ltd. which earned C$95 million in 1994. This process is substantially more streamlined than that in the United States where, as described above, grant of Section 214 authority can take months or years.

Today, the entire Canadian telecommunications market has grown to C$8 billion in annual revenues. Of that portion, all major competitors operating in the Canadian market, including ACC, have over C$960 million, or approximately 12% of total market revenues. *f*ONOROLA's annual revenues in 1994 were approximately C$108 million, or approximately 11% of the competitor market. *f*ONOROLA's 1994 revenues have grown by 80% over 1993 revenues and similar growth rates have been experienced by other Canadian competitors. This signals that the Canadian telecommunications market is vibrantly competitive and with recent and anticipated regulatory rulings respecting further market liberalization in such areas as the local telephony market, the Canadian telecommunications market is by far one of the most open and competitive in the world.

V. THE COMMISSION'S PROPOSED RECIPROCITY STANDARD SHOULD BE REVISED TO PROMOTE COMPETITION

*f*ONOROLA concurs with many of the Commission's objectives as outlined in the *NPRM*. Unfortunately, some of the specific proposals may actually frustrate, not promote, the benefits of global competition, often at the behest of established U.S. carriers. Moreover, portions of the *NPRM* could unnecessarily hinder the ability of U.S. carriers to secure financing from a broad range of sources, including by foreign-owned telecommunications carriers.

A. *The Commission Should Carefully Tailor any Reciprocity Rule to Encourage Foreign Market Liberalization*

The *NPRM* proposes to add an effective market entry standard to the existing public interest analysis of foreign carrier Section 214 applications for U.S. international services. The purpose of this market entry standard, as stated by the FCC, is to encourage foreign administrations to open their markets to U.S. entities. This will, according to the FCC:

> [E]liminate opportunities for foreign entities to engage in conduct that might have anti competitive effects in the provision of international services or facilities, including undue discrimination or other abuses of bottleneck facilities, and will promote effective global market competition.[20]

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[20] *NPRM*, ¶ 33.

In addition, the FCC has proposed that a number of factors be applied to its analysis of the foreign market in question.[21] However, the FCC does go on to state that each factor will not need be present in order to make a favorable finding, particularly in those instances where the market under examination is found to be fully competitive.[22]

At the outset, *f*ONOROLA supports the Commission's rejection of the comparable market access test proposed by AT&T in its petition for Rulemaking.[23]

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[21] As identified by the Commission, these factors include:

- whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign-affiliated carrier seeks to offer in the United States;
- whether competitive safeguards exist in the foreign country to protect against anti competitive and discriminatory practices, including cost allocation rules to prevent cross-subsidization;
- the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;
- timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities;
- the protection of carrier and customer proprietary information; and
- whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.

NPRM, ¶ 40.

[22] The Commission also requests comment "on whether our goals in this proceeding will be furthered by incorporating the effective market access test as an element of our Section 310(b)(4) analysis for Title III common carrier, aeronautical and broadcast license applications." *NPRM*, ¶ 33.

[23] *NPRM*, ¶ 41.

Based on the experience of the Company in attaining access to the U.S. market, *f*ONOROLA agrees that a so-called "mirror reciprocity" standard might be impossible to meet, given the different market conditions, legal regimes and economic realities that exist from country to country. For example, it is quite evident that, while the physical telecommunications networks in both Canada and the United States are substantially the same, the regulatory and market environments are somewhat different, in terms of the market structure, the application of regulatory jurisdiction and so on. Fundamentally, therefore, AT&T's proposal would not encourage additional market opening initiatives by foreign governments and thus could actually thwart the Commission's goals in this proceeding.

Moreover, too broad a regulatory brush could be just as damaging. The Commission would likely find it burdensome, time consuming and intrusive to investigate the entirety of a foreign telecommunications market before coming to a conclusion about a particular foreign investment in a particular U.S. carrier offering a particular service. Broad ranging investigation into an entirety of a foreign market would create delays and could permit U.S. entities seeking to evade competition to "game" the process by pursuing an ever-wider circle of Commission investigation. This is particularly true if the agency were tempted to examine services far afield from the particular authorization being sought, as the Commission appears to suggest in footnote 34 of the *NPRM*.

*f*ONOROLA thus recommends that the Commission clearly narrow any inquiry regarding market conditions in a foreign country to the particular type of authorization sought. Should the Commission adopt a reciprocity standard, it should confine its investigation to the general type of service, and carrier, proposed. As an example, foreign investment in a carrier operating solely on a resale basis should not trigger investigation into foreign government policies regarding entry of facilities based carriers in that country.[24] Any other rule would result in needless administrative burden with no commensurate public benefit.

B. *Any Market Entry Test Should Only Be Applied to Entities With Statutory Monopolies in Foreign Countries*

Assuming the Commission determines to apply a market entry test similar to that proposed in the *NPRM*, the agency should narrow the scope of any such inquiry to the entities that by law or policy are given peculiar advantages in their home market, and thus would have the incentive and ability to discriminate against other U.S. carriers. This Commission is correct to be cautious about entry or investment from a carrier that holds legal advantages that limit or prohibit competition. The Commission is also properly concerned about cases where foreign law or policy permits market entry by domestic nationals, but prohibit U.S. entities from competing.

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[24] *f*ONOROLA is solely a reseller of switched services of U.S. facilities-based carriers and currently has no plans to apply for an amendment to its current section 214 permits to allow it to construct facilities in the U.S. or purchase any Indefeasible Rights of User ("IRU").

The same policy rationale does not apply in the case of entry or investment from an entity that operates in a fully competitive environment at home and holds no special legal or regulatory advantages. *f*ONOROLA, for example, is merely a small player in a C$10 billion communications marketplace in Canada; it enjoys no special privileges, and has no special relationship with the CRTC. The Commission has recognized both that *f*ONOROLA has no incentive or ability to discriminate, and investment or entry by similar foreign carriers should be treated similarly. By contrast, as currently worded, the Commission's proposal could allow U.S. carriers to seek to burden even tiny competitors with increased regulation, solely to gain competitive advantage.[25]

This is particularly true with respect to the Commission's proposed revision of the definition of affiliate, both for its proposed market entry test and for distinguishing between dominant and non-dominant carriers thereafter.[26] One of the most important reforms of the FCC's international policies over the last decade was the liberalization of the affiliate definition from a strict 15 percent rule to a control standard. The

[25] For this reason, *f*ONOROLA opposes AT&T's repeated requests that foreign market openness be conditioned on the advent of cost-based accounting rates. *See NPRM*, ¶ 78. AT&T has put the cart before the horse: the Commission approved international simple resale in part because it would provide additional competitive pressures that would tend to drive accounting rates toward costs. Regulation of International Accounting Rates, 7 F.C.C. Rcd 559, 561 (1991). The Commission's current policy, not AT&T's proposal, is the best method to ensure that accounting rates are reduced throughout the world.

[26] *NPRM*, ¶ 57.

NPRM contains no tangible evidence of any threat to the public interest -- or to the encouragement of a fully competitive U.S. market -- stemming from less than controlling foreign investment. Moreover, even if such evidence existed, the Commission could address such issues on a case-by-case basis, without requiring a host of other foreign carrier entry or investment limitations that may not serve the public interest.

Even if the FCC retains its focus on foreign entities whether or not they enjoy a *de jure* monopoly in their home market, entry from or investment by Canadian carriers merits special treatment.[27] The Canadian telecommunications marketplace is the most like the United States and the most deregulated. Importantly, the Canadian market is and became highly competitive as a result of forward thinking policies of Canadian regulators acting in the best interests of Canadian consumers, *i.e., without* any market opening leverage from Section 310 or the proposed new rule. Moreover, the U.S. and Canadian markets are already tied by the North American Free Trade Agreement. Canadian investment and entry should therefore be exempted from any new market opening conditions adopted in this rulemaking.

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[27] This would be appropriate under the FCC's acknowledged desire that any new rule would be flexible enough to consider "other public interest factors" that might warrant entry or investment by foreign entities notwithstanding any market opening test. *NPRM,* ¶ 49.

VI. CONCLUSION

Over the past two decades, the Commission properly has sought to increase competition in U.S. international telecommunications. The current *NPRM* continues this trend, and embodies the same spirit.

Unfortunately, *f*ONOROLA is concerned that some of the Commission's specific proposals would fail in reality to increase competition; indeed, they might become a tool for entrenched carriers to block new entry. Accordingly, *f*ONOROLA recommends that any market opening test (1) be narrowly applied to the specific type of service and carrier involved; and (2) be applied only to carriers that enjoy *de jure* monopoly status in their country of origin.

Respectfully submitted,

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